



Law Enforcement

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Digest

HONOR ROLL

482nd Session, Basic Law Enforcement Academy - July 14th through October 6th, 1998

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Best Academic: John J. Fraser - Pierce County Sheriff's Office
Best Firearms: Robert S. Fische - Pierce County Sheriff's Office
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Corrections Officer Academy - Class 276 - August 27th through September 24th, 1998

Highest Overall: Jason Schlee - Asotin County Jail
Highest Academic: Steven Graham - Grays Harbor County Jail
Jason Schlee - Asotin County Jail
Highest Practical Test: Anthony Shavers - Larch Corrections Center
Highest in Mock Scenes: Theresa Ledbetter - Washington State Reformatory
Highest Defensive Tactics: Jason Karb - Whatcom County Jail

Corrections Officer Academy - Class 277 - August 27th through September 24th, 1998

Highest Overall: Wesley Farris - King County Department of Adult Detention
Highest Academic: Steven Morris - King County Department of Adult Detention
Highest Practical Test: Wesley Farris - King County Department of Adult Detention
Highest in Mock Scenes: Mark Chen - King County Department of Adult Detention
Highest Defensive Tactics: David Bray, Jr. - King County Department of Adult Detention

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WASHINGTON STATE SUPREME COURT

“KNOCK AND ANNOUNCE” RULE MET EVEN THOUGH UNDERCOVER OFFICERS DID NOT WAIT, AFTER ANNOUNCING THEY WERE OFFICERS WITH A SEARCH WARRANT, FOR HOME OCCUPANT (WHO WAS EYEBALLING THEM THROUGH A SCREEN DOOR) TO GRANT OR DENY PERMISSION TO ENTER

State v. Richards, ___ Wn.2d ___ (1998) [962 P.2d 118]

Facts: (Excerpted from Supreme Court majority opinion)

At about 5:55 p.m. on April 4, 1990, members of [a task force] executed a valid narcotics search warrant at the apartment residence of Petitioner Grant Myron Richards at 13012 - 117th Place Northeast, number F-4, Kirkland, King County, Washington. With guns drawn, [two detectives] approached a sliding glass door on the west side of the apartment. They had information this was the entrance most frequently used by Petitioner. Both detectives were dressed in jeans and T-shirts and had long hair and beards. They did not display any identifiable symbol of their status as police officers. Upon reaching the sliding glass door, the detectives found it open, the curtains open, and the sliding screen door closed. Through the screen door, Detective [A] could see Petitioner Richards and another man inside the apartment. Petitioner was kneeling on the floor adjusting a video cassette recorder with his back to the door. Detective [A] shouted, "Hey, Grant," and Petitioner turned and looked at him. Detective [A] then slid open the screen door, shouted "Police. We have a search warrant" and walked through the open door into the apartment. Uniformed police officers, who had been standing against the wall beside the screen door to conceal their presence from the apartment's occupants, immediately followed the two plainclothes detectives into the apartment after announcing their identity and purpose.

Petitioner Richards was advised of his "Miranda" rights, but waived them. He said he understood his rights and voluntarily agreed to speak with Detective [A]. Petitioner subsequently directed the police officers to cocaine he had hidden in his apartment. In addition to various drug packaging and paraphernalia, police officers recovered seven bindles of cocaine. Also discovered in the apartment were other controlled substances Petitioner claimed were for his personal use.

[Names of officers and footnoted references to record omitted]

Proceedings:

Richards was charged with possessing cocaine with intent to deliver. He moved to suppress evidence seized under the search warrant on grounds that the officers had violated the "knock and announce" rule of RCW 10.31.040 by failing to wait for him to respond before they entered his residence following their announcement. The trial court ruled that, because Richards could see the officers through the open glass door and closed screen door as they approached, and because the officers announced their identity and purpose, the officers did not need to wait for Richards to permit or deny entrance. Richards was then convicted as charged under the UCSA following a trial on stipulated facts.

Following some unusual appellate and trial court developments which were necessary to clarify the facts, the Court of Appeals affirmed the trial court decision in a published opinion. See State

v. Richards, 87 Wn. App. 285 (1997) **Nov '97 LED:17**. The State Supreme Court then accepted review.

ISSUE AND RULING: Did plainclothes police officers executing a valid search warrant violate the "knock and announce" rule, codified in RCW 10.31.040, where, absent exigent circumstances, the officers did not wait for Richards to grant or deny them entry into his apartment after they made a face-to-face announcement of their presence, identity and purpose, and then immediately entered an open sliding glass doorway? (**ANSWER:** No, rules a 5-4 majority; waiting for a response would have been a useless gesture, because the officers had adequately informed defendant of their identity and purpose, and he had no right to deny entry.) **Result:** Affirmance of King County Superior Court conviction for possessing cocaine with intent to deliver.

ANALYSIS BY MAJORITY:

The majority opinion authored by Justice Smith begins by discussing the State Supreme Court's interpretation of the "knock and announce" rule of RCW 10.31.040 in State v. Coyle, 95 Wn.2d 1 (1980) **March '81 LED:03**. In Coyle the State Supreme Court had suggested that, in order to comply with RCW 10.31.040, police must first implicitly or explicitly A) demand admittance and B) be denied admittance before forcing entry after they "knock and announce" their identity and purpose. The Richards majority concludes the entry was ok under the particular search-warrant-execution facts of this case. By announcing prior to entry that they were officers with a search warrant, in full view of Richards, the officers: A) complied with the "demand for admittance" element; and B) did not need to wait for permission or denial of permission to enter, because Richards was aware of their identity and purpose, and hence waiting would not have served any purpose underlying the rule.

The Richards majority emphasizes that each "knock and announce" case must be resolved on its own special facts. The majority distinguishes a 1978 Court of Appeals case, State v. Ellis, 21 Wn. App. 123 (1978), in which plainclothes officers executing a search warrant similarly approached the resident's home in an undercover role. In contrast to the Richards case, in Ellis, the undercover officers announced their identity and purpose only after their attempt to gain a ruse-consent entry had failed, and they did so at the same time that they made forced entry.

The Richards majority opinion concludes with a summary of its narrow holding:

Service of a search warrant implicitly constitutes demand for admission to premises. To wait for grant or denial of admission after an occupant has been made aware of a police officer's presence and purpose would serve no logical purpose. The police officer is already authorized by the search warrant to enter the premises without permission from the occupant.

In this case, the purposes of the "knock and wait" rule, RCW 10.31.040, were satisfied because there was no unannounced entry, there was no danger of violence or property damage, and entry through an open sliding glass door by moving a sliding screen door did not invade the occupant's privacy because the police officers gave a reasonable warning identifying themselves and announcing their purpose. Under these circumstances, it would serve no purpose to require the officers to wait for a response to a demand or request for admittance.

The police officers in this case complied with the requirements of the "knock and wait" rule stated in RCW 10.31.040. The Court of Appeals correctly determined the trial court did not commit error in denying Petitioner's motion to suppress cocaine found in his apartment by police officers who entered with a search warrant after announcing their identity and purpose.

Dissent in Richards: Justice Alexander writes a dissenting opinion joined by Justices Johnson, Madsen and Sanders. The dissent argues that the majority's decision is inconsistent with the 1980 Supreme Court decision in Coyle. Coyle declared that, "police must, prior to a nonconsensual entry, announce their identity, demand admittance, announce the purpose of their demand, and be explicitly or implicitly denied admittance." Coyle declared further that officers in a face-to-face confrontation may force entry without requesting permission or being denied admittance (explicitly by words or gestures or implicitly by non-response) only if there is "virtual certainty" that the occupant knows that the persons announcing their presence and purpose are law enforcement officers. The dissent concludes as follows:

I am not suggesting that police officers who have announced their identity and purpose before entry must wait to enter until they have been explicitly or implicitly denied entry if to do so would be a useless gesture, I am simply saying that under RCW 10.31.040, as we have construed it in Coyle, the officers must be "virtually certain" that their identity and purpose is known to the occupant before they enter. In instances such as we have here, where the officers bore no visible indication of their authority and only announced their purpose and identity either as they entered, or immediately prior to their entry, it cannot be said there was such certainty.

LED EDITOR'S COMMENT: The Richards decision was a close call from a legal perspective. We don't know why the lead officers in the task force in this case chose to approach the residence in undercover clothing. The officers may have had a good tactical reason, peculiar to the particular facts of this case, to consider trying for a ruse consent. We believe that the usual and preferred practice, tactically and legally, is to have an obvious uniformed presence when executing a search warrant. Accordingly, it would seem that the better approach, once the ruse was abandoned, would have been to have the uniformed officers show themselves before entry.

WASHINGTON STATE COURT OF APPEALS

STATE CONSTITUTION REQUIRES SEARCH WARRANT TO USE DOG TO SNIFF FOR DRUGS AT RESIDENCE EVEN THOUGH NO WARRANT REQUIRED FOR PACKAGE SNIFFS

State v. Dearman, ___ Wn. App. ___ (Div. I, 1998) [962 P.2d 850]

Facts and Proceedings:

Police officers developed suspicion that Ivan Dearman was growing and distributing marijuana. The officers had some reports from informants which fell short of probable cause to search Dearman's residence. The officers corroborated the information in part: (a) by getting electrical consumption records on Dearman's residence, and (b) by going to Dearman's house where they observed, from a point along an outside normal public access route to the front door: (a) that the doors of the garage adjoining his house were covered in cobwebs, and thus appeared not to have been opened for a considerable period of time; and (b) that there was a humming noise coming from within the garage consistent with a grow operation there.

The officers watched the house and waited until Dearman left. They then approached the front door of the home by walking along a normal access route from the street to the residence. Along that normal access route, they stopped near the garage adjoining Dearman's house. Using their own respective senses of smell, the officers could not detect the smell of growing marijuana from that vantage point. However, when a k-9 officer directed a marijuana-sniffing dog to sniff near the horizontal seams of the garage doors, the dog alerted. The officers then obtained a search warrant, and, upon execution, found a marijuana grow operation in the garage.

Dearman was charged with manufacturing a controlled substance. However, prior to trial, the superior court granted Dearman's motion to suppress the evidence. The trial court ruled that the use of a drug-dog at a residence is a "search" requiring a search warrant.

ISSUE AND RULING: Is law enforcement use of a drug-sniffing dog at a residence a "search" requiring a search warrant? (**ANSWER:** Yes) **Result:** Affirmance of Snohomish County Superior Court suppression ruling. **Status:** At **LED** deadline, the Dearman prosecutor informed us that he would file for review in the State Supreme Court.

ANALYSIS:

Basing its decision in large part on the Washington Supreme Court decision barring warrantless use of the thermal detection devices-- State v. Young, 123 Wn.2d 174 (1994) **April '94 LED:02**-- Division One affirms suppression in an "independent grounds" reading of the Washington constitution, article 1, section 7.

In Young, the State Supreme Court held that the Washington constitution prohibited warrantless use of a thermal detection device in relation to a residence, because use of this "sense enhancing" device without a search warrant violates the privacy rights of the occupants of the residence. The 1994 Young decision of the State Supreme Court relied in part on a federal court decision -- U.S. v. Thomas, 757 P.2d 1359 (2d Cir. 1985) -- addressing usage of drug-detecting dogs at residences. The Dearman Court points out that the Young decision quoted from the Thomas decision as follows:

With a trained dog police may obtain information about what is inside a dwelling they could not derive from the use of their own senses. Consequently, the officers' use of a dog is not a mere improvement of their sense of smell, as ordinary eyeglasses improve vision, but is a significant enhancement accomplished by a different, and far superior, sensory instrument. Here the defendant had a legitimate expectation that the contents of his closed apartment would remain private, that they could not be "sensed" from outside his door...

Because of [the] defendant[’s] heightened expectation of privacy inside his dwelling, the canine sniff at his door constituted a search.

The Dearman Court goes on to point out that the State Supreme Court’s 1994 Young decision also endorsed the Federal Court declaration in Thomas that “[w]hen the police use sense-enhancing devices to obtain information from someone’s home that could not be obtained by unaided observation of the exterior, they should have a search warrant.”

LED EDITOR’S COMMENTS:

(1) SCOPE OF DEARMAN RESTRICTION ON USE OF DRUG-SNIFFING CANINES: As noted above, at LED deadline the prosecutor stated that he would file for review in the State Supreme Court in Dearman. What we say in our comments below regarding the implications of the Court of Appeals decision must be considered in light of the fact that Dearman could be reversed.

We are disappointed, but not totally surprised, by the ruling in Dearman. Past Washington appellate court cases involving privacy issues in canine drug-sniffing search situations have involved dogs which sniffed inanimate objects in non-residential settings. Thus, in the only four cases reported prior to Dearman, the Washington courts have upheld warrantless police use of drug-sniffing dogs: to randomly check packages in a bus station express package area (State v. Wolohan, 23 Wn. App. 813 (Div. III, 1979) Nov. ’79 LED:05); to check out suspicions at a safety deposit box (State v. Boyce, 44 Wn. App. 724 (Div. I, 1986) Nov. ’86 LED:06); to check a suspicious package at the U.S. Post Office (State v. Stanphill, 53 Wn. App. 623 (Div. III, 1989) June ’89 LED:14); and to check out a suspicious package at Federal Express (State v. Gross, 57 Wn. App. 549 (Div. I, 1990) Aug. ’90 LED:13). However, several of these cases have warned that the courts might view use of drug-sniffing dogs differently were the dogs to be used to sniff at persons or at residences. Dearman does not suggest that there is anything wrong with the holdings in these four cases, all of which permitted warrantless searches of inanimate objects or non-residential premises. So Dearman does not restrict warrantless drug-dog sniffing in these circumstances.

As for residential drug-dog sniffing, there is language in the Dearman decision which could support a narrow reading of the case to limit it to those residential circumstances where police, while on a direct access route to the front door, (A) purposely avoid contact with the resident (by hiding and watching until the resident leaves) and (B) place the drug-sniffing dog’s nose in a place—at the seams of the garage door—where an ordinary visitor would be unlikely to place his or her nose). Our best guess is that most courts will read the decision more broadly. Based on the way in which the Dearman Court distinguished the prior Washington cases, a court in a future case could easily see Dearman as a restriction not only on most residential investigation, but also as to non-residential investigative contacts with people. We think that, if the Dearman decision withstands further Court review, its restriction on the use of drug-sniffing dogs will mean that warrantless use of such specialized canines will be prohibited in two categorical situations: (1) in residential searches -- but only under the general circumstance where a search is not otherwise permitted under a warrant or under one of the recognized exceptions to the warrant requirement (i.e., a dog may be used to aid in a warrant search, consent search or search incident to arrest at a residence); and (2) in

searches of persons -- but again only in circumstances where such a search is not otherwise permitted under a warrant or under one of the recognized exceptions to the warrant requirement (i.e., a drug-sniffing dog may be used to aid in a search of a person on consent, incident to arrest, or under a warrant). In sum, we believe that a drug-sniffing dog may be used to assist in executing a warrant or in searching persons and vehicles at the scene of a lawful search incident to arrest or lawful consent search. However, if a drug-sniffing dog is brought to the scene of a car stop at a point where the car is occupied and arrest is not yet justified, the use of a dog to sniff at the occupied car may be subject to question under the Dearman approach, we believe. Such a “fishing expedition” with the dog will have a better chance (we don’t give odds on this one) of withstanding challenge if the occupants of the vehicle are first asked to step out of and away from the vehicle.

Note further that the Court of Appeals did not address an alternative argument by the prosecutor. The prosecutor in Dearman asked the Court of Appeals to apply the rule applied by courts in some other jurisdictions which have interpreted the law to permit warrantless dog sniffs of otherwise protected areas based on “reasonable suspicion.” See discussion of this line of cases in 1 WAYNE LAFAVE, SEARCH AND SEIZURE, sec. 2.2(f) at 461-463 (3rd Ed. 1996). The Dearman prosecutor continues to pursue this alternative theory in his petition for review in the State Supreme Court.

We doubt that Dearman has significant implications for use of non-drug dogs to track persons. In almost all situations where dogs are used to track persons, there will be exigent circumstances which justify an intrusion into a residence and which justify the ultimate interference with personal liberty and privacy of the person tracked and seized.

(2) IMPLICATIONS OF DEARMAN RULING FOR USE OF OTHER SENSE-ENHANCING DEVICES: The prosecutor in Dearman argued that use of a drug-sniffing dog was like use of binoculars. Past case law has held that police may use binoculars to maintain their cover while observing persons located in public areas (State v. Jones, 33 Wn. App. 275 (Div. I, 1982) Feb. ’83 LED:13), and even to look into a residence (State v. Ludvik, 40 Wn. App. 257 (Div. III, 1985) Sept. ’85 LED: 06), so long as the binoculars do not allow the officer to see anything that the officer could not see with the naked eye from a lawful (“open view”) vantage point. Also, our State Supreme Court has held that there is no privacy violation if an officer approaches a residence at night from a normal public access route and enhances his or her vision through use of a flashlight. State v. Rose, 128 Wn.2d 388 (1996) March ’96 LED:02 (the majority in Rose asserting that use of flashlights is quite common in society, so a resident cannot reasonably expect that a visitor to the front door won’t have a flashlight and shine the flashlight through an uncurtained living room window from that vantage point).

We think this case law can be combined to allow use of sophisticated night vision devices to observe what is going on in public areas. However, because such devices are not prevalent in the community, we do not believe that this case law would generally permit law enforcement officers to use such devices to maintain surveillance on what is going on inside private premises. Our best guess, based on our reading of the thermal detection case of State v. Young, 123 Wn.2d 174 (1994), is that the Washington courts will bar such nighttime surveillance unless such officers can establish that: A) but for the need to maintain cover, the observed nighttime activity could have been observed

with the totally unenhanced nighttime naked eye (no light enhancement, no distance magnification); or B) perhaps that exigent circumstances existed.

”NECESSITY” IS DEFENSE TO CHARGE FOR “UNLAWFUL POSSESSION OF A FIREARM”

State v. Stockton, 91 Wn. App. 35 (Div. I, 1998)

Facts and Proceedings:

Police officers were dispatched to the scene of a street altercation. By the time police officers got to the scene, everyone had fled the scene. A citizen who had witnessed the latter stages of the fight told police what he had seen.

The citizen testified at trial that a fight among several people was in progress when he heard a noise and looked out his apartment window. The witness testified he saw a gun drop to the ground in the melee, but he did not see where the gun came from. The witness then saw the defendant, Stockton, pick up the gun and point it at the other combatants. Defendant did not fire the gun, and the fighting continued briefly before defendant ran away with the gun.

A police K-9 tracked defendant from the fight scene to where he was hiding in the bushes. Defendant was flushed out and arrested. Police found the gun, cocked and loaded, hidden in the bushes.

Defendant was a convicted felon with multiple felony convictions, including one conviction for possession of a controlled substance. His testimony about the fight is as follows: he was walking along minding his own business when a man approached him to try to sell him drugs. Defendant declined the offer, and then several other men accosted him and tried to rob him. In the fray a gun possessed by one of the other men fell on the ground. Defendant picked it up but did not use it. After the fight continued a little longer, defendant ran away and hid in the bushes from his assailants. As he heard the police searching for him, defendant decided to hide the gun, because he knew that as a felon he was not permitted to possess a gun. Therefore, he tried to hide the gun under the bushes and then emerged.

At trial defendant argued a “necessity” defense, asserting that he picked up the gun as a means to protect himself. On cross examination, the prosecutor asked defendant if he was familiar with purchasing drugs on the street, and defendant responded with admissions about his drug conviction. The jury convicted Stockton of unlawful possession of a firearm under RCW 9.41.040.

ISSUES AND RULINGS: 1) Did defendant’s testimony “open the door” to otherwise impermissible questions about his drug conviction? (ANSWER: No); 2) Was defendant properly permitted to submit a “necessity” defense to the jury? (ANSWER: Yes) Result: Reversal of Snohomish County Superior Court conviction for unlawful possession of a controlled substance; remanded for re-trial.

ANALYSIS:

1) Opening the door to prior misconduct questions

Prior to trial, the court had determined that specific evidence of defendant’s prior drug convictions and other convictions could not be admitted. Evidence Rule 608 generally does not allow such evidence because it is too prejudicial. However, the trial court ruled that when defendant told his story about turning down a drug sale offer, he opened the door to questions on the subject of his prior drug activity. The Court of Appeals explains as follows its view that the trial court erred in this respect:

Otherwise inadmissible evidence is admissible on cross-examination if the witness “opens the door” during direct examination and the evidence is relevant to some issue at trial. For example, when a witness testifies to his good character on direct examination, the opposing party is entitled to make further inquiries on the subject during cross-examination even though that evidence would otherwise be inadmissible. But a passing reference to a

prohibited topic during direct does not open the door for cross-examination about prior misconduct.

Stockton's testimony that he thought the men were trying to sell him drugs was no more than a passing reference to any knowledge he may have had about drugs. It is equally likely that someone who had never purchased drugs would understand an approach like the one Stockton described to involve drugs. As such, it did not open the door to testimony about his prior drug use.

2) Necessity defense

The Court of Appeals explains as follows its view that the common-law "necessity" defense was available to Stockton under the facts of this case:

To establish this defense, Stockton had to show, (1) he was under unlawful and present threat of death or serious injury, (2) he did not recklessly place himself in a situation where he would be forced to engage in criminal conduct, (3) he had no reasonable alternative, and (4) there was a direct causal relationship between the criminal action and the avoidance of the threatened harm.

In *State v. Jeffrey*, [77 Wn. App. 222 (Div. III, 1995 Oct '95 LED:06], Division III held the necessity defense applies to unlawful possession of a firearm, and a defendant is entitled to an instruction on the defense if he demonstrates facts supporting the elements of the defense. The State argues *Jeffrey* was wrongly decided because the Legislature intended that unlawful possession of a weapon be a strict liability crime with no defenses. Alternately, it contends that, even if the defense is available, Stockton failed to make a prima facie showing of the facts entitling him to the instruction. We disagree with both arguments. The *Jeffrey* court correctly concluded that necessity is a valid defense to unlawful possession of a firearm. And under the evidence presented at trial, Stockton was entitled to a jury instruction on that defense.

BRIEF NOTES FROM THE WASHINGTON STATE COURT OF APPEALS

(1) DETECTIVE CAN'T TESTIFY RE HIS INTERPRETER'S TRANSLATION OF INTERROGATION – In *State v. Garcia-Trujillo*, 89 Wn. App. 203 (Div. I, 1997), the Court of Appeals reverses a child rape conviction. The Court of Appeals rules that the trial court erred in allowing a detective to give hearsay testimony regarding an interpreter's translation of a defendant's interrogation.

Garcia was charged with second degree rape of a child based on his acts of consensual sex with a 13-year-old. Garcia was an illegal immigrant who spoke only Spanish. The investigating detective arranged to have a border patrol agent translate the detective's interrogation of the suspect. The interrogation focused on: a) whether the girl had told Garcia that she was 17, and b) whether Garcia had reasonably believed her.

At trial, the border agent/interpreter had a somewhat vague recollection of the questions and answers uttered in the interrogation. The detective was then allowed to testify to fill in some of the gaps in the interpreter's testimony. The jury ultimately found Garcia guilty as charged.

The Court of Appeals reverses, applying the "interpreter hearsay" rule previously stated in *State v. Huynh*, 49 Wn. App. 192 (Div. I, 1987) **Dec '87 LED:13**. That rule is that a witness may not testify, for any purpose, about the contents of another person's out-of-court statement, if the testimony of the witness is based solely on a translation of the other person's spoken words, rather than a direct understanding by the witness of those words. The only exceptions to this rule are where: 1) the testimony is not offered for the truth of the

matter asserted; or 2) the interpreter is an agent of the person making the statement, or is otherwise authorized to speak on the person's behalf. Whether the interpreter is an agent of the person making the statement or authorized to speak on the person's behalf depends on the facts and circumstances of the situation, with particular focus on whether the interpreter and the person making the statement have interests that conflict.

The Washington State Supreme Court has never addressed the "interpreter" hearsay issue. Some Federal courts have adopted a less restrictive "language conduit theory." The Federal courts hold that if a translator is "no more than a language conduit," then the translator does not create an additional level of hearsay.

The Garcia-Trujillo Court rejects the Federal "language conduit theory" and determines that: 1) the testimony was offered for the truth of the matter asserted, and 2) the border agent/interpreter was not Garcia's agent. Therefore, it was error for the trial court to allow the detective to testify to what the interpreter had told him as to Garcia's responses to interrogation. The error was not harmless, so the case must be retried.

Result: Reversal of Skagit County Superior Court conviction for second degree rape of a child.

(2) THEFT OF MULTIPLE GUNS ONE OFFENSE UNDER FORMER SENTENCING LAW – State v. Roose, 90 Wn. App. 513 (Div. III, 1998), the Court of Appeals rules that a theft of multiple firearms in a single incident can be "the same criminal conduct" and therefore one offense under the sentencing law.

Washington's statute on "theft of a firearm," RCW 9A.56.300(3), states: "each firearm taken in [a] theft under this section is a separate offense." However, the sentencing statute at RCW 9.94A provides in relevant part that multiple offenses will be treated as the "same criminal conduct," and hence just one offense, if the crimes: "require the same criminal intent, are committed at the same time and place, and involve the same victim." RCW 9.94A.400(1)(a).

The Court of Appeals in Roose holds that the sentencing provision addressing the "same criminal conduct" controls over the "separate offense" provision in the "theft of a firearm" statute. The Roose Court distinguishes between the latter statute and the clear "anti-merger" provision of the burglary statute at RCW 9A.52.050. The burglary statute provides that a person who commits any other crime while committing a burglary "may be punished" for the other crime, as well as for the burglary, and "may be prosecuted separately." The burglary anti-merger statute has been held to control over the "same criminal conduct" provision in the sentencing statute. See State v. Lessley, 119 Wn.2d 773 (1992). The Roose Court states that the critical difference between the burglary anti-merger provision and that in the "theft of a firearm" law is that only the burglary provision expressly addresses sentencing.

Result: Affirmance of Stevens County Superior Court convictions of theft of a firearm (nine counts), but reversal of sentence and remand to trial court for resentencing.

LED EDITOR'S NOTE: It appears that 1998 amendments to RCW 9.94A under chapter 235, Laws of 1998, change the sentencing rule for firearms thefts committed on or after June 11, 1998. There can be no sentencing merger under the 1998 amendments.

(3) NO EX POST FACTO PROBLEM WITH APPLYING "THREE STRIKES" LAW TO CONVICTIONS FOR OFFENSES WHICH OCCURRED BEFORE EFFECTIVE DATE OF LAW – In State v. Angehrn, 90 Wn. App. 339 (Div. I, 1998), the Court of Appeals rules that, under the Persistent Offender Accountability Act (POAA – originally known as the "three strikes and you're out" law, but now also including a "two strikes" sentencing provision), where a criminal act constituting the last "strike" occurs after the enactment, application of life-without-parole sentencing provision of the POAA does not constitute ex post facto punishment. The Court of Appeals explains that it does not matter that prior convictions are included in the sentencing formula:

Angehrn argues that the Act increased the punishment associated with his first and second strike crimes because the previous convictions were used to classify him as a persistent offender. However, the policy of prohibiting the ex post facto application of legislation is not

to prevent future changes in punishment levels. Rather, the policy is to ensure “fair notice and governmental restraint when the Legislature increases punishment beyond what was prescribed when the crime was consummated.” In this case, POAA was passed in November 1993, well before Angehrn committed the robberies that constituted his third most serious offense. As previously stated, POAA’s increased punishment is only triggered upon the third conviction of a most serious offense. As a result, Angehrn had fair notice that he would be sentenced to life without the possibility of parole if convicted of a third most serious offense.

We find that POAA does not constitute ex post facto punishment when applied to cases where the act constituting the third strike occurs after POAA’s enactment.

[Citations omitted]

Result: Affirmance of King County Superior Court conviction (of four counts of robbery) and sentence (life imprisonment without parole).

(4) NO CONSTITUTIONAL PROBLEM IN APPLYING AMENDED LAW TO CONSIDER PRIOR DEFERRED DUI PROSECUTION AS PRIOR OFFENSE FOR SENTENCING PURPOSES – In City of Richland v. Michel, 89 Wn. App. 764 (Div. III, 1998), the Court of Appeals rejects a constitutional challenge to application of 1995 amendments to DUI sentencing laws.

In 1992, Jon Patrick Michel received a deferred prosecution for DUI. On September 13, 1995, he was arrested again for DUI. Two weeks earlier, on September 1, 1995, an amendment to the DUI sentencing law (former RCW 46.61.5055) had gone into effect – the amendment had increased the punishment for persons with prior DUI convictions during a preceding five-year period. **[LED EDITOR’S NOTE: In 1998, under chapter 207, Laws of 1998, the Legislature increased the time period to seven years, but this 1998 change, effective January 1, 1999, was prospective and therefore was not before the Michel Court.]** Included as a prior DUI conviction under the 1995 amendment was a prior deferred prosecution within the five-year period.

Among Michel’s several challenges to his sentencing under the 1995 amendment was an argument that such sentencing violated constitutional prohibitions against ex post facto laws. The Court of Appeals rejects this challenge under the following analysis:

A statute violates the prohibition against ex post facto laws, if it imposes punishment for an act which was not punishable when committed or increases the punishment that was annexed to the crime when it was committed. But RCW 46.61.5055 does not increase or enhance punishment for a crime committed before the effective date of the statute. It applies prospectively only to crimes committed after September 1, 1995. As with the habitual offender statutes, a defendant is on notice upon the effective date of the act that accruing another violation within the statutory period (five years in the case of RCW 46.61.5055) will enhance the penalty. Mr. Michel could have avoided the impact of RCW 46.61.5055 by restraining himself from committing another DUI.

[Some citations omitted]

Result: Affirmance of Benton County Superior Court DUI conviction and sentence (45 days in jail plus \$1200 fine).

(5) ONCE-EVERY-FIVE-YEARS LIMIT ON DEFERRED PROSECUTIONS UNDER FORMER RCW 10.05 STARTS WHEN FIRST COURT GRANTS DEFERRED PROSECUTION STATUS – In State v. Bays, 90 Wn. App. 731 (Div. II, 1998), the Court of Appeals interprets the once-every-five-years limit on DUI deferred prosecutions under RCW chapter 10.05.

The defendants had argued that the five-year period begins with the date of the first offense on which deferred prosecution is granted. The prosecutor argued that the five-year period begins only upon completion or termination of the first deferred prosecution. The Court of Appeals finds a middle ground, ruling that the start date is the date when the trial court grants deferred prosecution on the first offense.

Result: Affirmance of Grays Harbor County Superior Court decision; Timothy M. Bays and Warren E. Ballard ruled eligible for deferred prosecution.

LED EDITOR'S NOTE: Beginning in 1999, the issue in this case is made moot by 1998 amendments to RCW 10.05 under chapter 208, Laws of 1998. Effective January 1, 1999 (i.e., for DUI's on or after that date) a DUI offender is eligible for deferred prosecution only once in a lifetime.

(6) BICYCLIST IN CROSSWALK IS PEDESTRIAN WHETHER ON OR OFF BIKE – In Pudmaroff v. Allen, 89 Wn. App. 928 (Div. I, 1998), the Court of Appeals holds, in a citizen vs. citizen, personal injury civil case, that a motor vehicle operator who struck a bicyclist in a crosswalk could be held liable for damages under the following facts:

Richard Pudmaroff was bicycling south on the interurban bicycle trail in Kent, Washington. The trail intersects 277th Avenue at a marked crosswalk, for which approaching motorists are required to yield by a crosswalk yield sign. Users of the trail approaching the crosswalk encounter a stop sign.

When Pudmaroff arrived at the intersection, he stopped and waited for traffic. A car in the westbound lane, the lane closest to Pudmaroff, stopped and waited for him to cross. In the eastbound lane, he saw a vehicle that was "a good distance away," so he mounted his bike and started to cross. Before he reached the other side, he heard the screeching of brakes and was struck by Leona Allen's vehicle.

Allen testified that as she approached the crosswalk in the eastbound lane, she was slowing down for railroad tracks on the other side of the crosswalk. Her vision of [Pudmaroff] was obscured by a westbound vehicle.

The Court of Appeals rules that under these facts the motor vehicle operator had violated RCW 46.61.235(4), which provides:

"Whenever any vehicle is stopped at a marked crosswalk or at any unmarked crosswalk at an intersection to permit a pedestrian to cross the roadway, the driver of any other vehicle approaching from the rear shall not overtake and pass such stopped vehicle."

The Court of Appeals holds further that, despite RCW 46.04.400 (which excludes bicyclists from the legal definition of "pedestrian") and RCW 46.04.670 (which includes bicycles in the legal definition of "vehicle"), a bicycle rider traveling in a crosswalk is entitled to the same protections – and is subject to the same duties – as a pedestrian. The fact that the rider is astride the bicycle rather than on foot is relevant only for purposes of determining if the rider exercised ordinary care under the circumstances.

Result: Affirmance of King County Superior Court summary judgment ruling for the bicyclist, Richard Pudmaroff.

LED EDITOR'S NOTE: While Pudmaroff v. Allen is a civil liability decision, we believe the case supports citing a driver for a traffic infraction (RCW 46.61.235(4)) under the same facts.

(7) MARIJUANA POSSESSOR'S DEFENSE OF RELIGIOUS FREEDOM REJECTED; ALSO, HIS DEFENSE OF UNWITTING POSSESSION SIGNIFICANTLY RESTRICTED – In State v. Balzer, 91 Wn. App. 44 (Div. II, 1998), the Court of Appeals overturns trial court rulings that would have: 1) permitted defendant to defend his marijuana possession on religious grounds, and 2) placed the burden on the State to

prove beyond a reasonable doubt that defendant was not in “unwitting possession” of cocaine found in his car.

1) Religious Freedom Issue. Though expressing substantial skepticism, the Court of Appeals assumes, solely for the sake of constitutional analysis, that defendant’s marijuana possession was tied to sincerely held religious beliefs in the Rainbow Tribe Church and the Rastafarian religion. Nonetheless, the Court of Appeals holds that the State of Washington has a “compelling interest” in prohibiting possession of marijuana, with extremely limited exceptions. Accordingly, after thorough analysis, the Court of Appeals flatly rejects defendant’s argument that he should be able to present a religious freedom defense to a jury in a marijuana possession case. [NOTE: the Court of Appeals distinguishes factually the narrowly limited decisions from two other jurisdictions involving peyote use in the Native American Church, and the Court also notes that there are conflicting decisions even as to this factually distinguishable usage.]

2) “Unwitting Possession” Issue. The Court of Appeals also overturns the trial court’s determination that the State must prove the absence of “unwitting possession” beyond a reasonable doubt. The Balzer Court notes that there was a 1994 Court of Appeals decision which suggested that this might be the rule. However, a subsequent State Supreme Court decision, as well as a subsequent Court of Appeals decision, held that an “unwitting possession” defense is an affirmative defense which defendant must prove by a preponderance of the evidence. Therefore, the trial court had erred in Balzer in ruling both 1) that the State bore the burden and 2) that the burden was proof beyond a reasonable doubt.

Result: Reversal of Thurston County Superior Court rulings on issues and instructions to be presented to the jury; remanded for trial.

(8) RESTITUTION ORDER WENT TOO FAR IN REQUIRING POSSESSOR OF STOLEN CAR TO PAY FOR PERSONAL PROPERTY THAT WAS IN CAR WHEN IT WAS STOLEN – In State v. Woods, 90 Wn. App. 904 (Div. II, 1998), the Court of Appeals agrees with defendant Woods that a trial court order of restitution went too far in requiring her, as the September 1995 possessor of a stolen car, to pay restitution for personal property that had been in the car when it was stolen in August 1995.

Melinda A. Woods pleaded guilty to the charge of knowingly possessing a stolen car on September 4, 1995. In a subsequent restitution hearing, the prosecution submitted evidence that she was the person who had stolen the car on August 17, 1995. She was not charged with the theft; her “possessing stolen property” charge was not amended; and she did not expressly agree, as part of the plea bargain, to pay restitution for the articles of personal property that had disappeared from the car between August 17, 1995 (when it was stolen) and September 4, 1995 (the date to which she pleaded to unlawful possession). The Court of Appeals holds that a defendant such as Ms. Woods cannot be required to pay restitution “for crimes other than those with which [the defendant] was convicted unless [the defendant] expressly agrees in a plea agreement.”

Result: Reversal of that part of Clark County Superior Court restitution order relating to personal property which disappeared from the vehicle between August 17, 1995 and September 4, 1995.

(9) MARIJUANA WEIGHT INCLUDES WATER IF PLANT IS “WET” WHEN SEIZED – In State v. Kazeck, 90 Wn. App. 830 (Div. II, 1998), the Court of Appeals rejects defendant’s argument that, for classification purposes, seized marijuana must be dried before it is weighed.

When Kazeck was arrested, the marijuana he possessed was damp, because it had recently been cut from a growing marijuana plant. Because the weight of the damp marijuana exceeded 40 grams, he was charged with felony possession under RCW 69.50.401(d). Finding no language in the Uniform Controlled Substances Act to support Kazeck’s dried-weight argument, the Court of Appeals holds to be irrelevant the fact that, when dried, the marijuana’s weight was under 40 grams.

Result: Affirmance of Cowlitz County Superior Court conviction for felony possession of marijuana.

(10) LAWFUL SEIZURE OF PASSENGER AND VEHICLE, LEADING TO DISCOVERY OF EVIDENCE, PRECLUDES “UNLAWFUL SEIZURE” CLAIM OF DRIVER – In State v. Thomas, 91 Wn. App. 195 (Div. II, 1998), the Court of Appeals rules that a vehicle driver’s claim that he was unlawfully seized by police is irrelevant, because the evidence that was used against him at trial was the fruit of a lawful seizure of a passenger in the car. The facts in Thomas are set out in part in the Court of Appeals opinion as follows:

Thomas and his 17-year-old girlfriend, Kimberly Wixom, were sitting in their car outside an Olympia deli when Police Officer Fred Doughty approached them on foot and engaged them in conversation. Officer Doughty had been observing the suspicious behavior of Thomas and Wixom for some time and decided to try to talk to them and find out what he could about them. After talking for a brief time, Officer Doughty asked if he could see their identification. Wixom, however, said she did not have a driver’s license. Officer Doughty had seen Wixom driving the car earlier, so he asked if she had a learner’s permit; Wixom said she did not. Officer Doughty told the couple, “I will be right with you,” and stepped back three steps to the rear of the car, where he used his hand-held radio to call in the information. He confirmed that Wixom did not have a driver’s license.

Officer Doughty saw Thomas move around in the car and appear to reach for something in the car. He walked back up to the driver’s side and asked Thomas if he had any weapons. Thomas said both he and Wixom had knives. Officer Doughty then asked Thomas to step out of the car, while another officer asked Wixom to step out. He then performed a pat-down search for weapons. During the search, he noticed that Thomas had a vendor’s key hanging out of his pocket.

At that point, Officer Doughty went over to talk with Wixom, while his partner came to talk with Thomas. Doughty noticed a large number of coins scattered around the car, hundreds of dollars worth. He read Wixom her rights and asked her about the coins and the vendor’s key. Wixom admitted that she and Thomas had been stealing money from newspaper vending machines.

Officer Doughty went back over to the car. As he approached, he overheard Thomas telling the other officer that he had “never done so much heroin in all (his) life.” Officer Doughty walked to the passenger side of the car and picked up Wixom’s purse. Lying on top of the purse was a small notebook. Inside the notebook were notes about different vending machines, indicating good days and bad days. Officer Doughty attempted to advise Thomas of his rights, only to be repeatedly interrupted by Thomas, who insisted he knew his rights. Officer Doughty asked Thomas if he was stealing from vending machines and he admitted that he was. Officer Doughty asked Thomas if he could search the car, but Thomas refused. Thomas’s car was impounded at the scene, but not searched apart from the seizure of the purse and notebook.

Later at the police station, Thomas signed a written consent to search his car. A subsequent search revealed \$800 to \$900 in coins, along with heroin, methamphetamine, scales and syringes. Thomas was charged with possession of stolen property in the second degree and two counts of possession of a controlled substance.

The Court of Appeals holds that the temporary detention of the passenger, Ms. Wixom, was lawful under Terry v. Ohio based on the officer’s reasonable suspicion that she had earlier operated the vehicle without a driver’s license. The officer developed this reasonable suspicion before he stepped away with Thomas’s driver’s license. The Thomas Court concedes that taking a person’s driver’s license while running a radio check turns a mere “contact” into a “seizure” under Washington law. Thus, under other circumstances, Thomas might have had an argument as to whether the officer had “reasonable suspicion” as to him at the point of seizure. However, the argument would be irrelevant in this case, the Thomas Court holds.

That is because the lawful seizure of Ms. Wixom to investigate her suspected driving violation made temporary detention of the vehicle lawful as well. The detention of the vehicle incident to investigation of Ms.

Wixom's violation led to discovery of evidence which was later used against her and Mr. Thomas. The Court of Appeals holds that the detention of Mr. Thomas was merely incidental to Ms. Wixom's detention, and any error in the trial court decision relating to the lawfulness of that detention was harmless, because Mr. Thomas's detention (as opposed to Ms. Wixom's simultaneous detention) did not lead to discovery of the evidence in the car.

Result: Affirmance of Thurston County Superior Court convictions of Mr. Thomas of one count of possessing stolen property in the second degree and two counts of unlawful possession of controlled substances (heroin and methamphetamine).

(11) FIFTH AMENDMENT BARS TESTIMONY RE REFUSAL BY DUI SUSPECT TO TAKE FST – In City of Seattle v. Stalsbrotten, 91 Wn. App. 226 (Div. I, 1998), the Court of Appeals rules that it violates the U.S. Constitution's Fifth Amendment self incrimination clause for police to testify that a DUI suspect refused to perform field sobriety tests. The Court of Appeals explains its conclusion in this regard by quoting as follows from an Oregon court decision:

The state argues that the specie of evidence it seeks to use in this case is analogous to evidence of flight or a breath test refusal and is, therefore, admissible. We disagree. Evidence of refusal to take a field sobriety test is also communicative, but it is in a different category from evidence of flight or evidence of refusal to provide required non-communicative evidence. There is no statutory or other legal requirement that a driver take the field sobriety tests, either before or after arrest. While an officer may properly request a driver to do so, the officer may go no further. Because defendant had no obligation to take the test, there could also be no conditions placed on his refusal. Use of the fact that he refused enables the state to obtain communicative evidence to which it would otherwise have no right, as a result of defendant's refusal to provide noncommunicative evidence to which it also had no right. The situation is thus a true Hobson's Choice.

[Citation to Oregon court decision omitted]

The Court of Appeals explains that the trial court judge can frame jury instructions so that the jury will be less likely to speculate why they didn't hear about field sobriety tests. Also, if the DUI defendant "opens the door" to entry of such evidence in the way he or she questions witnesses or presents evidence, then such refusal evidence can be admitted.

Finally, the Stalsbrotten Court goes on to rule that the trial court's admission of the officer's testimony about the FST refusal was harmless error in this case. The evidence of Stalsbrotten's intoxication was so overwhelming that the Court of Appeals concludes beyond a reasonable doubt that a reasonable jury would have found Stalsbrotten guilty of DUI. The Court recites the evidence of Stalsbrotten's head-over-heels guilt as follows:

First, the arresting officer personally observed Stalsbrotten driving without his headlights at about midnight on a snowy February night. Second, Stalsbrotten's car drifted back and forth between two lanes of traffic at a speed well below the limit. Third, Stalsbrotten failed to pull over after the officer activated his lights. Fourth, Stalsbrotten's eyes were bloodshot and watery, his breath reeked of alcohol, and his speech was lethargic and slurred. Fourth, the officer had to repeatedly ask to see Stalsbrotten's license and Stalsbrotten had difficulty finding his license in his wallet. Fifth, while standing on the sidewalk, Stalsbrotten swayed from side to side approximately four to five inches. Sixth, Stalsbrotten repeatedly introduced himself to the officer. Seventh, Stalsbrotten insisted on getting himself into the officer's squad car after being arrested and proceeded to get himself wedged in the vehicle with his feet above his head. Eighth, Stalsbrotten refused to take a breath alcohol test and signed an implied consent form that advised him that refusal could be used as evidence in a criminal trial. Finally, the officer, during the hour or so that he was in contact with Stalsbrotten, observed Stalsbrotten exhibit mood swings from crying, to threatening, to cordial.

Result: Affirmance of King County Superior Court decision which had affirmed District Court DUI conviction.

LED EDITOR'S COMMENT: There is conflict in the cases nationally whether an officer may testify to a DUI suspect's refusal of field sobriety testing. Stalsbrot is the first Washington case on this point. The State Supreme Court has not yet addressed the issue, but for now officers and prosecutors should assume the restrictive ruling of Stalsbrot to be the law.

(12) EVIDENCE OF PRIOR UNCHARGED SEXUAL MISCONDUCT IS ADMITTED AGAINST CHILD MOLESTER WHERE IT SHOWS THE OFFENDER'S COMMON SCHEME OR PLAN – In State v. Baker, 89 Wn. App. 726 (Div. I, 1998), the Court of Appeals upholds the trial court's admission of testimony regarding an accused child molester's very similar past misconduct.

Ordinarily, because evidence of past uncharged misconduct or a past conviction is highly prejudicial, trial courts will not admit the evidence in a prosecution for another incident. Before admitting such evidence under Evidence Rule 404(b), a trial court must find: A) that a preponderance of the evidence shows that the alleged other-misconduct actually occurred, and B) that the probative value of the evidence outweighs its prejudicial value. Probative value prior uncharged misconduct or a past conviction is great when the contact is part of a common scheme or plan.

The Baker Court describes as follows: A) the facts of the charged offense in the case before it, B) the facts of the prior uncharged offense which the trial court had admitted into evidence, and C) the trial court's finding of similarity:

CHARGED OFFENSE FACTS

On the evening of the alleged molestation, Baker held a "slumber party" in his camper **with his girlfriend's daughters**, eight-year-old N.H., and her two sisters. N.H., wearing pajamas, shorts, and underpants, slept in bed with Baker. Baker rubbed her back as she went to sleep. She awoke later when she felt Baker rubbing her "privates" through her clothes. She immediately left to tell her mother what happened. Later N.H.'s mother told her that it was an accident because Baker was asleep, but N.H. thought he was awake.

UNCHARGED OFFENSE FACTS

Kathy Mitchell [**Baker's daughter**] testified that when she visited Baker between the ages of seven or eight and eleven, he would sleep in bed with her, rub her back before she went to sleep, and she would awaken during the night with her underwear pulled down and his hand between her legs. The defense attacked Mitchell's credibility by way of testimony from other members of Baker's family. The court also heard testimony from a prosecutor who chose not to pursue charges against Baker for Mitchell's alleged molestation because Mitchell could be impeached on collateral issues.

TRIAL COURT FINDING OF SIMILARITY

The court found by a preponderance of the evidence that the touching of Kathy Mitchell occurred, that the incidents were substantially similar, and that her testimony was admissible to show that the touching of N.H. was part of a common scheme or plan and was not an accident.

In upholding the trial court's admission of the "uncharged crime" evidence under the leading State Supreme Court decision, State v. Lough, 125 Wn.2d 847 (1995) **June '95 LED:06**, the Court of Appeals explains in part:

When the allegation is child molestation, evidence of prior similar acts creates a likelihood that the jury will convict based solely upon character. Because the inference is so

prejudicial, some courts have held that the prejudice cannot be cured by an instruction. On the other hand, prior similar acts are highly probative of common scheme or plan, particularly in child sex abuse cases, because of (1) the secrecy in which the acts occur, (2) the vulnerability of the victims, (3) the lack of physical proof of the crime, (4) the degree of public opprobrium associated with the accusation, (5) the unwillingness of victims to testify, and (6) the jury's general inability to assess the credibility of child witnesses.

In affirming the trial court's balancing, the Lough court determined that (1) the evidence was highly probative of common scheme or plan, (2) the need for the testimony was great because the defendant's acts in drugging the victims rendered them unable to remember the events clearly, and (3) the court gave a limiting instruction.

Here, the trial court acknowledged that the evidence was highly prejudicial, but determined that the prejudice was overcome by the necessity for the testimony under the facts of the case, including that the alleged molestation occurred while N.H. was asleep. Under these circumstances, the court reasonably concluded the need for the testimony outweighed its prejudice.

[Some citations omitted]

Result: Affirmance of Skagit County Superior Court conviction for first degree child molestation.

(13) PUD PARK IS "PUBLIC PARK" FOR PURPOSES OF UCSA ENHANCED SENTENCING—In State v. Gordon, 91 Wn. App. 415 (Div. III, 1998), the Court of Appeals holds that a park-like area created and maintained at the Rocky Reach Dam by Chelan County Public Utility District No. 1 was a "public park" for purposes of the sentencing enhancement provisions of RCW 69.50.435 of the Uniform Controlled Substances Act and of RCW 9.94A.310(6).

RCW 69.50.435(1) provides for sentence enhancement when, among other things, controlled substances are manufactured, sold, delivered, or are possessed with the intent to manufacture, sell, or deliver in, among other designated locations, "a public park." Subsection (f)(5) of that subsection defines "public park" as "land, including any facilities or improvements on the land, that is operated as a park by the state or a local government." Defendant argued unsuccessfully in this case that a county public utility district is not a "local" government for purposes of this statute. The Court of Appeals finds this argument unpersuasive, both in light of the municipal corporation status of a PUD and in light of the purpose of the UCSA sentencing enhancement provisions to protect those who use public parks, particularly children.

Result: Affirmance of Chelan County Superior Court conviction of Dow A. Gordon for three counts of delivery of heroin and one count of possession of heroin, as well as affirmance of sentence enhancement by 24 months.

STATE V. WHITE REVISITED

In the September '98 LED, we digested the July 1998 decision of the State Supreme Court in State v. White, 135 Wn.2d 761 (1998). White held in an "independent grounds" interpretation of the State constitution, article 1, section 7, that law enforcement officers conducting an inventory of the contents of an impounded motor vehicle are not permitted to check the trunk area (even where a passenger compartment trunk latch would allow a thief to gain easy access to the trunk) unless the officers have a "manifest necessity" to do so. We promised in our September '98 LED entry to revisit footnote 11 at page 771 of the majority opinion in White, which reads as follows:

Further, the record does not indicate White was ever asked whether he would consent to an inventory search, and the State makes no claim that he was. White was never given the opportunity to reject the protection available and, thus, the search is also suspect under State v. Williams, 102 Wn.2d 733 (1984) [Dec. '84:LED:01] . In Williams, the court held police may not conduct a routine inventory search following a lawful impoundment of a vehicle without first asking the owner, if present, if he or she will consent to the search. ... In Washington, an individual is free to reject the protection that an inventory search provides and take the chance that no loss will occur. [Some citations omitted by LED Editor]

In light of this warning from the White majority, we suggest that Washington law enforcement agencies should at least consider development of an inventory search protocol that addresses the footnote 11 warning. However, because agencies would be writing on the blank slate of an "independent grounds" interpretation of the state constitution, we are presently in a quandary as to what might be provided in such a protocol. Perhaps an inventory search consent form could be developed which would advise the person in control of the vehicle that the person has a choice of: A) signing a broad waiver of any claims against the agency for lost or destroyed property in the vehicle, or B) alternatively, giving consent for officers to conduct an inventory search of the vehicle.

We will continue to ponder this issue, and we are open to suggested approaches to the White majority's footnote 11. It appears fairly clear from the above-quoted text of footnote 11 that the Court would not require consent to do an inventory search of passenger areas if neither the vehicle owner nor anyone else with authority to consent were present or capable of giving a valid consent. But beyond that, we can only guess at the boundaries of the suggested rule. May officers use the "waiver vs. consent" method we suggest in our preceding paragraph, or would that be deemed too coercive? May officers routinely ask for consent to inventory the contents of the trunk without giving special warnings about the special protections of that area under White? Ultimately, the answers to these questions will come only from future court decisions, but meanwhile, as we mull White's footnote 11, we will try to see if there is a consensus view in law enforcement.

STATE V. FERRIER REVISITED

In the October '98 LED, we addressed the State Supreme Court's August 1998 decision in State v. Ferrier 136 Wn. 2d 103 (1998) Ferrier held that law enforcement officers trying to obtain consent to search when conducting "knock and talk" procedures at residences must give three explicit warnings as to consent rights (the 3 R's of rights: (1) Right to Refuse, (2) Right to Restrict scope, and (3) Right to Retract). We promised in our "LED Editor's Comments" section in the October LED to revisit Ferrier. We do so now in limited fashion, addressing three questions. We urge our law enforcement readers to check with their prosecutors and/or legal advisors on all points.

1. Need for a fourth warning? Several readers have asked if it is really necessary to give the fourth warning set forth in the model forms provided in the October LED. That fourth warning would advise the person: "I understand that evidence found during the search may be used in court against me or against any other person." In the October LED at page 10 we said: "While the fourth warning was not a part of the Ferrier majority's analysis, it seems to us to be a reasonable addition to the other warnings." We stand by our comment, but we acknowledge that we lack the "street" perspective to evaluate whether this fourth warning might be a consent "deal-breaker." We would also acknowledge that a solid argument can be made that the Ferrier majority was very clear as to what it wanted the consent warnings to include, and therefore Ferrier does not require such a fourth "knock and talk" consent warning.

2. Will the Ferrier ruling be extended beyond “knock and talk” procedures at residences? We have received a few comments questioning our speculation that the consent rights requirement might someday be extended to a few other contexts outside residential searches (which might similarly be perceived by the courts as involving inherent elements of coercion). Please be aware that our speculation is based only on a “gut reaction,” not on any express language in the (mostly) narrowly written opinion of the Ferrier majority.

3. Can any guidance be obtained by reviewing the case law in Mississippi and New Jersey where the courts have held that knowledge of the right to refuse is an element of consent? In independent grounds rulings under their own constitutions, the courts in New Jersey and Mississippi, apparently the only two states to do so, have found, as a general, across-the-board element of consent, that the person must have knowledge of the right to refuse. Note that the courts in those states have imposed no Ferrier-like warnings requirements, and the Mississippi courts have vacillated as to who has the burden of proof on this issue. After scanning the case law in those states and talking to government attorneys in each of those states, we don’t see much help in the case law of those states for those attempting to understand the ramifications of Ferrier. The Ferrier Court was uniquely focused on what the majority there perceived as an inherent coerciveness of “knock and talk,” and we don’t see the ruling as signaling an across-the-board burden on Washington law enforcement agencies to establish the consenting party’s knowledge of the right to refuse consent in every case involving a consent to search. We assume, of course, that criminal defense attorneys, as is their job, will claim to see things differently, and that there will be a flood of suppression motions on the scope of Ferrier.

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